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IN THE

Supreme Court of the United States

October Term, 1963

No. 363

JAMES VINCENT KEOGH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner James Vincent Keogh prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered April 25, 1963.

Opinion Below

The opinion of the Court of Appeals (reported at 317 F. 2d 459) is printed in the appendix to this petition (S 1a-53a),* together with its opinion on the petitions for rehearing (S 54a-56a).

Jurisdiction

The judgment of the Court of Appeals was entered on April 25, 1963, and a timely petition for rehearing was denied on May 27. A petition for rehearing *in banc* was denied

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* The appendix to this petition is separately bound. References thereto will be preceded by the letter "S". References without such designation will be to petitioner's appendix in the Court of Appeals.

on the same day. The time to file this petition was extended to July 26 by order of Mr. Justice Harlan dated June 17.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

In a criminal case, where serious conflicts of evidence created a "real basis for the existence of reasonable doubt" (S 52a), and where the jury deliberated for more than two days:

1. Is it unduly coercive on the minority for the Court to give the *Allen* charge a second time, at the request of the jury foreman, after the jury had been deliberating for nearly 49 hours, particularly when it was then clear that there was a distinct minority in the jury?

2. May the Trial Court assume without a hearing that press contacts with jurors during their deliberations have not been prejudicial to the defendant?

3. Where a judge has undertaken to charge on the facts, and has omitted mention of significant defense theories and vital evidence favorable to the defendant, can such error be excused because these theories and evidence had been dealt with in counsel's summation?

4. Is the defendant's right to freedom from unreasonable search and seizure violated when government agents examine and copy his personal notebooks during an oral interview which he permitted them to have with his staff, but without obtaining his consent to examine his personal documents?

5. Where the defendant is not a Federal officer and made no attempt to corrupt a Federal officer, does the alleged receipt of a consideration for talking to a sentencing Judge render the act a corrupt endeavor to obstruct justice in violation of 18 U.S.C. §1503?

Statutes Involved

The statutes involved in the indictment are 18 U.S.C. §§371 and 1503. Constitutional provisions involved are the Fourth, Fifth and Sixth Amendments to the United States Constitution. All are printed in the appendix hereto (S 63a-65a).

THE FACTS

Petitioner James Vincent Keogh was tried in the United States District Court for the Southern District of New York under an indictment (13a-20a) charging conspiracy to obstruct the due administration of justice in violation of Title 18, U.S.C. §1503. After the jury deliberated more than two days, it rendered a verdict of guilty, on which petitioner was sentenced to a prison term of two years. The Court of Appeals, while affirming petitioner's conviction in a 53-page opinion, found that there was "such real basis for the existence of reasonable doubt" (S 52a).

Petitioner Keogh was a Justice of the New York Supreme Court, sitting in Kings County. The conspiracy to obstruct justice here charged allegedly centered about a bankruptcy fraud case pending in the Eastern District of New York in 1961. Three people, including the defendant Sanford Moore, were indicted for concealing assets of the bankrupt Gibraltor Amusements, Ltd. They pleaded guilty on March 9 and were sentenced on March 30, 1961 by Federal District Judge Leo F. Rayfiel.

The gravamen of the charge against petitioner Keogh is that he spoke with Judge Rayfiel about Moore at a luncheon conference on March 29, and that he received $22,500 as a consideration for doing so. The conversation between Judge Rayfiel and Keogh at the luncheon of March 29 was a fleeting one—"very brief," as Judge Rayfiel put it. He could not even "characterize it as a discussion." Judge

Rayfiel further testified that Keogh merely stated to him that "his friend informed him that Moore was a very fine fellow and wondered whether leniency could be extended to him" (447a). Judge Rayfiel told him "[N]o, it couldn't, that the report I had on him indicated that leniency wasn't merited. That is all there was to the discussion, substantially all" (447a). Judge Rayfiel supported Keogh that in their brief discussion Keogh did not make "any suggestions or request," and that nothing Keogh said could influence what he actually did (458a).

This fleeting conversation will result in petitioner Keogh's career of thirty-seven years in public office (see 639a-44a; 647a-48a) being terminated in disgrace, unless this Court reviews the case and reverses the conviction.

The Government's Case

The chief witness for the Government and mastermind of the alleged conspiracy was the defendant Robert M. Erdman, who was petitioner's personal physician and friend. The trials of Erdman and Moore who also testified for the Government, were severed. To this date they have not been tried; and Moore received a reduction of sentence from three years to one year in the bankruptcy fraud case (hereinafter called the "Moore" case) for his cooperation in this prosecution (310a).

It was claimed by the Government witnesses that they first conspired solely with the defendant Kahaner, then Chief Assistant U.S. Attorney for the Eastern District of New York, during the pre-indictment stage of the Moore case, to manipulate matters in the U. S. Attorney's office. Kahaner, they claimed, agreed for a consideration of $35,000 to limit the number of defendants to be named in the forthcoming indictment to three and to arrange to have those indicted treated "softly" by having their case brought

before "a specific Judge in April", (22a-29a, 357a-61a, 30a-32a, 34a). Concededly, Keogh never knew of these pre-indictment activities in the Moore case (158a-163a).

According to the Government's proof, it was only after Kahaner had apparently reported to Erdman in early March 1961, that he had done all he could in the matter, that Erdman went to Keogh to solicit his help. It was the theory of the Government's case against Keogh (1) that for a corrupt consideration he had agreed and endeavored during the post-indictment and pre-sentence stage of the Moore case, to influence Judge Rayfiel on behalf of those indicted; and (2) that after the sentence, Keogh participated in an alleged scheme to have the attorney for the Trustee in bankruptcy, one Jaspan, accept an offer of restitution by Moore to the bankrupt estate.

Erdman testified that shortly before March 3, 1961 he went to see petitioner and gave him a copy of the indictment in the Moore case. He claimed that Keogh gave him a card at that time listing the cost of certain improvements at his summer home and allegedly told him "don't worry". (37a-39a). On about March 3, according to Erdman, he made a payment in cash to Keogh while alone with him in his Supreme Court chambers; and again on March 29, also alone, he made another payment to Keogh after allegedly receiving another card from him (42a-43a, 48a-49a). The total sum of money allegedly given to Keogh was $22,500. Kahaner is supposed to have received $12,500. Moore allegedly gave the money to Erdman for transmission to Keogh and Kahaner.

The Defense

Petitioner Keogh testified at the trial. It was his position that he never agreed or knowingly participated in an illegal scheme to obstruct justice. He denied the uncorroborated

word of the co-conspirator Erdman that corrupt money had been given him. Keogh did admit giving the two cards to Erdman, but under totally different circumstances and on dates (April and June 1961) well after those claimed by Erdman (654a-57a, 704a-09a, 717a-18a). He explained these cards as innocent indications of his financial situation to a purported close friend, who had expressed an interest (and not to record for posterity evidence of a corrupt bargain). In June and July, 1961 Erdman lent Keogh $1,500 (68a-79a, 539a), hardly a likely action if Keogh had already received $22,500 for an unsuccessful attempt to obtain leniency for Moore.

Keogh maintained that he became involved in the Moore matter only because of the importunities of his close friend Erdman. Erdman had falsely led Keogh to believe that Moore was in turn a close friend of his for whom he was concerned; and asked Keogh to speak to Judge Rayfiel to have him look at Moore's background to see whether consideration could be afforded him (666a-69a, 680a). Believing Erdman, Keogh had one short conversation with Judge Raynel during a luncheon date on March 29, as described above, and arranged an appointment for Erdman with the Judge on the next morning.

With respect to the restitution phase of the case, Keogh had two contacts with Jaspan, (683a-85a). Keogh claimed that it was a legitimate matter in which his interest was Erdman, as Jaspan testified; Jaspan further testified that he was never influenced by Keogh and Keogh never asked him to do anything (479a-82a). The record is clear, moreover, that Keogh never spoke to Judge Rayfiel about restitution or its use as a means of reduction of sentence (450a).

On the basic question of whether $35,000 was ever in Erdman's hands to give to petitioner there was a sharp issue. Moore testified that $25,000 came from an associate

in England (203a, 252a), but that associate testified that the $25,000 transfer had been given to one Belmont for a business venture (427a-28a, 440a). Erdman had been accused by this same associate of stealing the $35,000 (272a, 436a). Further facts on this point are set forth later in this petition. The defense contention that Erdman never had the $35,000 to give, and that if he did he kept it himself, was not mentioned in the Trial Judge's charge, although he discussed the Government's case at length (see pp. 21-3 *infra*).

Facts relating to other phases of the case are stated under the specific reasons for granting certiorari.

REASONS FOR GRANTING THE WRIT

I

The repetition of the Allen charge was unduly coercive on the jury minority.

The *Allen* charge (164 U. S. at 501) creates a danger of coercive influence on a jury minority. Because of this, it has been repeatedly restricted by this Court and lower courts. Review should be granted in this case so that this Court may determine whether the *Allen* charge should be reversed as outmoded, or whether to resolve a conflict in circuits concerning the proper use of the charge, and whether its use in this case was coercive under all the circumstances.

The *Allen* charge was given twice in this case. It came first at 10:00 P.M. on Friday, June 15, 31 hours after the case had been submitted to the jury. The foreman sent a note to the court saying "We find it impossible to come to an agreement" (Court Exh. C; 928a). The Court did not read the jury's note to counsel, as petitioner was entitled to have done (*Shields* v. *U. S.*, 273 U. S. 583, 587 [1927]). Instead, the Court told the jury, "I have a note from you in which you suggest that you desire to discon-

tinue your efforts" (870a), and then read the *Allen* charge to the jury (870a-73a). Although the Court gave a verbal caution that the verdict must represent their true decision (876a), it emphasized the charge by saying that it was from "a Supreme Court opinion which is fairly well known to bench and bar called the Allen charge" (872a). A motion for mistrial, on the ground that any verdict would be a "submission of the weak to the strong", was denied (874a-75a).

The second use of the *Allen* charge was shortly before 4:40 P.M. on Saturday, after the jury asked for a rereading of the *Allen* charge (884a, 887a-88a). The verdict was returned at 7:00 P.M. (888a).

The *Allen* charge was originally approved by this Court in 1896 in *Allen* v. *U. S.* (164 U. S. 492), a case involving the third trial for a crime committed in Indian territory of western Arkansas. This Court has subsequently limited the use of the charge by holding that it is reversible error *per se* to give it after the trial judge has inquired as to how the jury is divided and has been informed of the existence of a minority. (*Brasfield* v. *U. S.*, 272 U. S. 448 [1926]; see also, *U. S.* v. *Dunkel*, 173 F. 2d 506 [2d Cir. 1949]; *Jacobs* v. *U. S.*, 279 F. 2d 826 [8th Cir. 1960]).

The *Allen* charge has been described as representing the "ultimate permissible limits", so that any deviation is error, as crossing the line between instruction and coercion. (See, e.g., *U. S.* v. *Rogers*, 289 F. 2d 433, 435-37 [4th Cir. 1961; collating cases]; *Stewart* v. *U. S.*, 300 Fed. 769, 782-87 [8th Cir. 1924]).

1. Modern thinking no longer supports the *Allen* charge. Stubborn minorities have been responsible for many of the great advances of civilization. There is no logical reason why a majority should be more sensible than a minority. The *Allen* charge includes a statement that:

> "If much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself" (164 U. S. at 501).

When three intelligent United States Circuit Judges agree that this is "a jury trial where there was such real basis for the existence of reasonable doubt" (S 52a), it is incongruous that a District Judge should say twice that "a dissenting juror should consider whether his doubt was a reasonable one" (872a, 887a).

The Court of Appeals for the Fifth Circuit, recognizing the changed conditions of the mid-twentieth century, reversed a case where a paraphrase of the *Allen* charge was used, saying:

> "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. There is small, if any, justification for its use." (*Green v. U. S.*, 309 F. 2d 852, 854 [1962]).

Judge Wisdom in the *Green* case expressed agreement (309 F. 2d at 854, n. 3) with the earlier statement of Judge Brown, dissenting in *Huffman* v. *U. S.* (297 F. 2d 754, 759 [5th Cir. 1962]):

> "The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge."

This Court has not considered the *Allen* charge since the *Brasfield* case in 1926.

2. The antipathy of the Fifth Circuit for the modern use of the *Allen* charge is in sharp contrast with its repeated approval in the Second Circuit. (See e.g., *U. S.* v. *Thomas*, 282 F. 2d 191, 195 [1960]; *U.S.* v. *Tolub*, 309 F. 2d 286, 289-

90 [1962]). There is a basic conflict in attitude which should move this Court to take jurisdiction.

The fact that the use of the *Allen* charge "is becoming more and more commonplace" (*Huffman v. U. S.*, *supra*, 297 F. 2d at 739) makes it important for this Court to clarify the circumstances under which it can be used today. The *Allen* charge is so susceptible of coercive use that it has been strictly limited. It is coming under serious direct attack. We submit that the time has come for this Court to resolve the dispute by interring the doctrine.

3. The repeated use of the *Allen* charge under the circumstances of this case rendered it so coercive as to justify reversal. We maintain that circumstances, as well as mere language can take the *Allen* charge beyond "ultimate permissible limits" (*U. S. v. Rogers*, *supra*). In this case, which was a highly publicized trial, newsmen had already harassed the jury during their deliberations, converging upon them "like a sea" (see pp. 13-14, *infra*), the *Allen* charge had already been given once, the jurors were exhausted, having reported themselves "hoarse" from debate as early as Thursday (861a), they had been locked up for two nights and faced the imminence of being held together another night away from their families, with the next day Sunday (Father's Day), and the foreman specifically requested the *Allen* charge, thereby indicating that there was still a recalcitrant minority. The repetition of the *Allen* charge under these circumstances after nearly 49 hours of deliberation went beyond the "ultimate permissible limits" of pressure on a jury to eliminate dissent.

4. We maintain, moreover, that the single circumstance of knowledge by the Trial Judge of the existence of a minority, when he gave the *Allen* charge for the second time, required reversal. This Court in the cases of *Burton*

v. *U. S.* (196 U. S. 283, 307-8 [1905]) and *Brasfield* v. *U. S.*, *supra* (272 U. S. 448, 449-50 [1926]), held that it is reversible error *per se* to give the *Allen* charge after the Court has inquired concerning the division of the jury. Logically it should make no difference if the Judge has learned without personal inquiry, that there is a distinct minority in the jury.

In this case, the request by the jury foreman to have the "*Allen* charge" given a second time (887a) was a clear indication that the jury was divided between a majority and minority, and that the majority wanted the others to be reminded of the duty of the minority to listen to the majority. Otherwise the foreman would not have asked for the repetition of the *Allen* charge dealing as it does with a majority and a minority. The repetition of the *Allen* charge under those circumstances, in spite of cautionary statements; had the same coercive effect as its use in the *Burton* and *Brasfield* cases.

Concerning a court's inquiry about the division of the jury, this Court said in the *Burton* case (196 U. S. at 308), "We do not think that the proper administration of the law requires such *knowledge* • • • on the part of the presiding judge" (emphasis added). We submit that the vice in the *Burton* and *Brasfield* cases was not so much the inquiry about the jury's division as the giving of the *Allen* charge with knowledge that a minority existed which might thereby be coerced into accepting the majority's view. (See also, *U. S.* v. *Dunkel*, *supra*, 173 F. 2d at 510; *Jacobs* v. *U. S.*, *supra*, 279 F. 2d at 832.)

Under all the circumstances of this case, protection of defendants' rights to trial by an impartial jury under the Sixth Amendment requires that further use of the *Allen* charge be curbed.

II

In permitting a verdict to stand in spite of improper contacts by outsiders with the jury and failing to grant a hearing thereon, the Courts below departed from applicable decisions of this Court on a matter important to a defendant's right to a fair trial.

The highly-publicized trial of a public official presents in sharp focus the important question of a court's responsibility to assure a trial by an impartial jury free of illicit outside influences. Throughout the trial of this case the jury was subjected to the repeated harassment and influence of the press and communication media. The trial of this case stimulated as much, if not more, publicity than any other trial during the past twenty-five years.

On the day Judge Rayfiel testified, for example, the New York Journal American carried the screaming banner headline, "U. S. Judge Accuses Keogh," which eight jurors and three alternates readily admitted having seen (507a-08a; 524a-31a, *passim*). This headline to which the jury was subjected represented a shocking distortion of Judge Rayfiel's testimony. It was inaccurate, misleading and unfair, as the Court of Appeals recognized. In the words of that Court it hardly bespoke "a proud and responsible press, whose constitutional freedom rises no higher than the criminal defendant's right to a fair trial" (S 19a).

To cite another example, on the evening preceding the summation of the Government to the jury, one of the leading television networks carried a repeat performance over the airwaves of an episode remarkably coincidental to this case. The program, known as "Cain's Hundred", told of an esteemed Federal judge who was accused and confessed to having corrupted the administration of justice by "fixing" cases during his career on the bench (756a).

This influence of the press and communication media reached its high point, however, during the deliberations of the jury. At midnight on June 14, when the jurors left the courthouse after their first day of deliberations to go to a hotel, they were inundated—in the words of the prosecutor—by a "sea of reporters" (866a). As the jury came down the front steps of the courthouse the photographers and newspapermen were standing below taking pictures, asked the jurors questions and ran alongside them (864a-866a). The Trial Court himself did not choose to swim through the "sea" to which the jury had been exposed. Evidently aware of the mob created by the congress of press and television reporters, when he left the Court House shortly after the jury, he "went out the side entrance." "I had them open it up especially for me" (864a-65a). The Trial Judge even likened the situation to the *Sinclair* case (279 U. S. 749 [1929]), "where jurors were trailed during the trial or shadowed" (866a).

No action was even attempted to rectify this deplorable situation until the late afternoon of the following day on June 15. By this time the incident had been repeated a second time—when the jury went out for lunch on June 15 (864a). Counsel convened in chambers during the late afternoon of the 15th when this two-time interference with the deliberations of the jury had been made known to them for the first time. Counsel suggested that future incidents of this type could be avoided if the Marshal would have the bus which was used to convey the jury to the hotel "brought down inside through the bottom passage" of the Court House. The jury "could go into their bus and nobody would see them." The Court agreed (866a). But the suggestion was not followed. The United States Marshal indicated to the Judge that he would keep the newspapermen and photographers away from the jury (867a). But the

Judge, himself, did not admonish the press and there was a renewal of the same kind of action, as pointed out by counsel for petitioner Keogh without contradiction on the night of June 15, when the jurors left the Court House for dinner (875a).

Protecting the jury from baleful influences is the obligation of the Court. Defense counsel have no right to control the jurors, but only to call any improprieties to the Court's attention.

The attitude of the Trial Court here, we submit, was one of abject surrender. He recognized that "the defendants are entitled to be protected from this kind of activity," but he stated, "I do not know what you can do about that" (867a). With respect to the insatiate demands of the press for photographs of the deliberating jury, the Court stated, "I suppose you can't avoid that" (866a). And as to the conceded occurrence of actual verbal contacts between the press and the deliberating jury, the response of the Court was that while the jury should not be put in that position, "I have full confidence that there is no reply made" (866a).

The Court of Appeals in its opinion noted that it does not "take lightly such interference with the proper conduct of trials;" and that if cameramen and reporters will not police themselves and the Marshals are unable to police them effectively, "sterner measures will be required" (848a).

We urge, however, that this is the case which required sterner measures. The three-time interference by the mob with the Jury could not but have affected their deliberations. These "sterner measures" should have been taken by the Trial Court and in the absence thereof by the Court of Appeals through the reversal of the conviction, or at the very least, as we shall point out, by ordering a hearing.

There was no warrant for the cavalier assumptions of the Courts below, without proof, that no reply had been made by any of the jurors to the newsmen, or that the questioning and communication between newsmen and jury was harmless. In accordance with the decisions of this Court, a hearing was required to explore the nature of the illicit contacts. Until such a hearing is held, and the contacts demonstrated to be harmless, they are deemed in the words of this Court, to be "presumptively prejudicial." No such hearing was ever held in this case; and hence, the presumption of prejudice obtains until this time.

In *Remmer* v. *U. S.* (347 U. S. 227, 229 [1954]), this Court announced the following rule:

> "In a criminal case, any private communication, contact, or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties."

Once such contact occurs, this Court held in *Remmer*, "the Trial Court should not decide and take final action *ex parte*," but rather,

> "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."

(*Id.* at pp. 229-30; see also *Mattox* v. *U. S.*, 146 U. S. 140, 150 [1892]; *Remmer* v. *U. S.*, 350 U. S. 377 [1956]; *Gold* v. *U. S.*, 352 U. S. 985 [1957]). In the second *Remmer* case, *supra*, this Court, after having directed a hearing, ultimately reversed the conviction and ordered a new trial because of the District Court's unduly restrictive interpre-

tation of the questions to be raised at such a hearing (350 U. S. at p. 382).

The attitude of the Court below is also in conflict with that of the Fifth Circuit Court of Appeals in *Pekar v. United States*, 315 F. 2d 319 (1963), where the trial court, following this Court's mandate in *Remmer*, held a hearing as soon as it was informed of a conversation with a juror, and the Court of Appeals reversed the conviction even though the conversation had nothing to do with the litigation.

The salutary nature of the presumption of prejudice which obtains and the requirement of a hearing are emphasized by the circumstances of this case. No man can say that the crowd, which intruded like a "sea", (86a), and which quite possibly included other bystanders besides newsmen, did not characterize the petitioner's conduct or shout derogatory remarks in a manner to create prejudice in the minds of the jurors. In the face of such serious uncertainty a conviction cannot be sustained. It is only upon a hearing, as required by this Court in the *Remmer* case, that such a matter can be resolved; and until such time the presumption of prejudice justifiably obtains to petitioner's benefit.

"This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived." *Irvin v. Dowd*, 366 U. S. 717, 730 (1961). An actual physical intrusion by the press on the jury during the deliberative process, as in this case, is the ultimate in pressures by news reporters and photographers. Sterner measures in the future are no solace to the conviction of an innocent person by exhortation on evidentiary matter, which may well have taken place. Unless this Court enforces the *Remmer* mandate as to outside

contacts with a jury, the right to an impartial jury will be emasculated by reluctance to set aside a verdict after a long trial, and by promises that something will be done in the future, in some other case.

III

A charge to the jury which omits mention of significant defense theories and of vital evidence favorable to the defendant is a denial of the Constitutional right to trial by jury.

In the significant area of the relations between court and jury, the Court of Appeals has introduced a novel new principle, that omission of defense contentions in a trial judge's charge on the facts is excusable if the items were covered by counsel's opening or summation. This rule, which would go far to weaken the protection a jury affords to a defendant, merits review by this Court.

While a Federal judge need not summarize the evidence at all in his charge to the jury, if he undertakes to do so, in accordance with the rule set forth by this Court, the summary must include the evidence "which makes, in favor of a party as that which makes against him" *Starr* v. *U. S.*, 153 U. S. 614, 626 [1894]). The charge, in other words, cannot be one-sided; it must be balanced in every respect (*Hickory* v. *U. S.*, 160 U. S. 408, 422-3 [1896]; *Quercia* v. *U. S.*, 289 U. S. 466, 470 [1933]). In particular, it is well established that "a criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence" (*U. S.* v. *O'Connor*, 237 F. 2d 466, 473 [2nd Cir. 1956]; *Tatum* v. *U. S.*, 190 F. 2d 612, 617 [D.C. Cir. 1951]; *Perez* v. *U. S.*, 297 F. 2d 12, 15-16 [5th Cir. 1961]; *Smith* v. *U. S.*, 230 F. 2d 935, 939 [6th Cir. 1956]; *Calderon* v. *U. S.*, 279 Fed. 556 [5th Cir. 1922]).

We urged below that the charge in this case was grossly imbalanced to the prejudice of petitioner Keogh. It was demonstrated, we submit, that vital evidence and theories of defense, bearing weightily on the issue of reasonable doubt, and which were abundantly supported by the record, were entirely ignored by the Trial Court in his charge to the jury. The Court of Appeals, while seemingly endorsing the rule which requires a balanced charge, excused deviation therefrom and the inadequacy of the charge in this case principally by reference to the openings and summations of counsel (See e.g., Opinion, below at S 30a, 35a, 40a, 43a). The Court held, we submit, that matters covered by counsel in their openings or summations need not be included in a balanced charge. The principle of a balanced charge, mandated by this Court, has been undermined by this holding of the Court below in this case.

(1) It can hardly be gainsaid that the word of counsel, a mere advocate in court, carries less weight and authority in the eyes and minds of the jury than the word of the presiding judge. As Mr. Justice Frankfurter aptly noted in *Bollenbach* v. *U. S.* (326 U. S. 607, 612 (1946)):

> "'The influence of the trial judge on the jury is necessarily and properly of great weight,' * * * and jurors are ever watchful of the words that fall from him" (*Id.* at p. 612).

(2) We believe it is equally significant, moreover, that the orientation of a summation and a charge are markedly different. The summation is argumentative; it is known and understood to be so by the jury. The charge of the court, however, is intended to be and is accepted by the jury as a statement of objective fact. Hence, the natural tendency on the part of a juror to subordinate the word of counsel to that of the court is intensified when the word

of the former is uttered in an argumentative context as contrasted with the sober statement of objective fact—devoid of argumentative implications—stated by the court in the context of a charge.

(3) Even more important, defense summation is so diluted in strength from the sequence in time, that it cannot realistically be relied on to cure later imbalance or inadequacies in the judge's charge. Defense summation here was followed by the prosecutor's summation, replete with argument allegedly sustaining a conviction. The Court in its charge in this case restated rather fully the arguments and evidence offered on the Government's behalf while the theories of defense of petitioner Keogh, though also stated in the summation, were ignored in the charge. Thus, the inexorable result of the charge in this case was that the arguments of the Government in its summation were judicially endorsed and recommended for consideration by the jury; while those of the defense were damned by silence. In this posture of events, the summation by defense counsel could not possibly have cured the charge, as the Court of Appeals held. Manifestly, its value was fatally diluted.

The matters ignored by the Trial Court in his charge in this case were vital. They touched on the heart of petitioner's defense and bore weightily on the issue of reasonable doubt. The presence of this evidence in the case, we believe, led the Court of Appeals to note that there was here existing "such real basis for the existence of reasonable doubt" (S. 52a); and yet, the omission of these matters from the charge was approved and the conviction of petitioner Keogh sustained.

Our contention is not that the charge must include "every thrust and counterthrust", as the Court of Ap-

peals suggested (S 40a). We maintain rather that an innocent public official accused of conspiracy to obstruct justice by endeavoring to influence a Federal Judge, can only win acquittal if his *basic defenses* pointing to innocence are fairly presented to the jury. Such are the minimum requirements of a balanced charge in this case. Thus, in advancing our position with respect to the charge in the Court below, we developed in particular four areas of omission bearing on petitioner's basic defenses: (1) the testimony of Judge Rayfiel tending to support petitioner and controverting that of his accusers in material respects; (2) facts and defense theories showing a disposition of the "corrupt money" other than to petitioner; (3) substantial contradictions between the Government witnesses, and evidence of their joint fabrication; and (4) those aspects of the evidence relating to the restitution plan which tended to exonerate petitioner of any wrong-doing and petitioner's theory that restitution was a legitimate act.

One illustration of serious imbalance in the first area is the emphasis on petitioner's alleged contacts with Judge Rayfiel after March 30th, without pointing out that Judge Rayfiel fully supported petitioner's denial of any such contacts. The charge refers to Moore's testimony that Keogh said on May 22nd that "he had just gotten through unsteaming Judge Rayfiel" (803a), and Erdman's testimony that Keogh said "Judge Rayfiel was mellowing" and that Keogh called Judge Rayfiel in his presence on May 31st (804a). Judge Rayfiel had testified to the contrary that Keogh never spoke to him about Moore after March 30 (460a), *but his testimony was ignored in the charge*.

In the event this application for certiorari is granted, we should like to develop upon the appeal, as we did below, all four of the described areas of omission to demonstrate the gross imbalance in the charge. At this juncture, how

ever, to illustrate the imbalance of which we complain, we shall focus briefly upon the second of the four areas of omission, namely, the defense theories developed at trial respecting the disposition of the corrupt money.

The ultimate issue in this case, as the Trial Court stated in his charge (818a), was whether the corrupt money had in fact been paid by Erdman to Keogh. On cross-examination of the co-conspirators inconsistent explanations were made by them as to the disposition of the very funds which were allegedly paid to Keogh. It developed that the money allegedly given to Keogh was in fact unavailable for the alleged payment to him or had been diverted elsewhere. These matters should have been pointed out to the jury in the charge—particularly in view of the circumstance that Erdman testified that he and he alone in the presence of nobody else, gave the money to Keogh. This reasonable doubt about the money was reflected in several ways, of which we point to two in particular:

(1) There was evidence indicating that one Belmont, who had invested $25,000 in cash with Moore in a business venture in England, had been given his money back by Moore in cash during 1961 and no later than April—the very period of the alleged payment of $22,500 to Keogh; and that these payments had been made from funds transmitted from England through Moore's accounts at the Meadowbrook National Bank (427a-28a, 430a-34a, 440a, 300a, 306a-09a). The conspirators testified that $25,000 of the "corrupt money" came from England through Moore's accounts at the Meadowbrook National Bank (203a, 208a, 236a-37a, 251a-53a). The Bank records showed (Govt. Ex. 77 at p. 930a) and the Government conceded (569a) that the total of the monies sent through Moore's accounts at the Meadowbrook National Bank amounted to *only* $25,000 during this period. It thus appeared that the money allegedly sent

from England through the Meadowbrook National Bank for payment to Keogh had instead been given to Belmont. Moreover, at one point, even the Government witness Forman admitted that the only money sent from England in 1961 was the money which Belmont got (440a, 428a).

(2) There was also evidence to support the defense theory that if, indeed, Erdman got the money from Moore he kept it for himself. The co-conspirators had told the Grand Jury and Federal agents that they believed this (436a-37a, 444a, 446a, 261a, 295a). Moore admitted that Forman had accused Erdman of stealing $35,000 (272a). Kerner and Schwach testified that when Moore asked Erdman for the money back, Erdman said he still had a lot of work to do (389a, 405a-07a). Forman testified that when he asked Erdman to give the money back, calling Erdman a crook, liar and cheat, Erdman actually agreed to do so by giving him a $5,000 check and a $30,000 note which Forman refused (417a-18a, 435a-36a). Forman then insisted that Erdman endorse the restitution notes to make good the $35,000 (436a). Erdman, in fact, did endorse $50,000 of notes to the Trustee in bankruptcy on behalf of Moore without any other reason. He even admitted to the Trustee in bankruptcy, an entirely independent witness, as late as July, 1961, that *he had security for the rest*. Some of the $50,000 he had endorsed (598a-99a), for which security he gave no source to the Trustee and which happens to be the very total sum of the "corrupt money" Erdman claimed to have received. The fact that the Court of Appeals stated that "we do not understand" Erdman's purported explanation (8a-34a, 35a) leaves unrefuted this evidence that he kept the money. This renders all the more serious the failure of the charge to mention this point.

One may read the charge in its entirety and not find a single reference to any of these matters, each inconsistent

with the corrupt money being paid to Keogh and bearing heavily on reasonable doubt. These were important matters for the jury to consider, upon which counsel had placed great stress (586a-88a), and had sufficient foundation in the record to warrant their recital by the Court in its charge, both as to facts and theory of defense.

The Court of Appeals, recognizing the thrust of this evidence, noted not only that there was "such real basis for the existence of reasonable doubt;" but even wrote that its omission from the charge might well warrant invocation of the "plain error" rule (S 35a). This palpably plain error was overcome in its view, however, by reference to the summations. The omission of these matters from the charge, we submit, was indeed "plain error," could not be cured by the summations for the reasons outlined above, and warrants review by this Court. The position of the Court of Appeals, we submit, is novel, constituting a departure from accepted principles announced by this Court and traditional rules governing the administration of Federal trials.

Though we do not doubt the ability and high purpose of the learned Trial Judge, even Jove nods. In this case there were serious omissions from the charge of matters on which petitioner Keogh had relied.

IV

Examination of petitioner's telephone message books without his consent violated his right to freedom from unreasonable search and seizure.

In finding a waiver of constitutional privilege from the present record, the Courts below have weakened defendants' protection against unreasonable search and seizure. The determination below raises for review the standards applicable for determination of a waiver of constitutional

rights, as well as the suggestion by the Court of Appeals that a waiver for Fourth Amendment purposes can be more readily found than for Fifth Amendment purposes.

The Government, immediately prior to the close of its case, sought to compel the production by petitioner Keogh of certain personal telephone message books, kept for him by his clerks (548a-50a; 559a), and to introduce them in evidence. The theory of the Government was that Keogh waived any constitutional privilege with respect to these books by "consenting" to their examination by the F.B.I. (562a; 553a, 556a, 559a-60a).

A hearing was held on the issue of consent, at which petitioner's clerk Benjamin and F.B.I. Agent Maher testified (548a-562a). The Trial Court held that Keogh had not given any "authorization for an examination of his books" (563a), and the Government withdrew its request (562a-563a). The prosecutor "conceded on the record that there wasn't any explicit * * * waiver" (565a).

When petitioner sought a hearing to determine the use which had been made of the fruits of this unauthorized examination (563a-65a), however, the Trial Court held that there had been no illegal search and seizure (567a). The Court of Appeals affirmed, holding that while the evidence adduced may not have been sufficient to show a "binding pledge" to waive the privilege against self-incrimination and thereby entitle the Government to compel "*produc[tion]*" of the papers, the same evidence was sufficient to make out a consent for purposes of "*examination*" of the papers by the F.B.I., and to negate the possibility of an unlawful search (S 15a, n. 5).

The evidence showed that Keogh met the Government agents in his robing room on the seventh floor of the Kings County Supreme Court House. They asked to "interview"

(557a, 561a) his law clerks, and he authorized them to "[T]ell" the FBI agents what "they want to know" (550a), and give them "any information" they desired (562a). There was no mention of documents. So that the agents might be "more comfortable", petitioner suggested that they go up to his chambers on the eleventh floor of the Court House for the interview (699a). There the agents, in petitioner's absence, examined his personal message books, which were kept there. They did not go back to the seventh floor to ask his permission, which they could have easily done (See *U. S.* v. *Ruffner*, 51 F. 2d 579, 580 [D. Md. 1931]).

The examination of the message books was prejudicial to petitioner, for the information derived therefrom was used, we maintain, to help Erdman to fabricate a convincing story at the trial. For instance, Erdman's Grand Jury testimony was extremely fuzzy as to dates. He could not volunteer a single date of his own recollection (see, *e.g.*, G. J. Minutes, pp. 302, 307; 31a, 83a-84a). Yet at the trial he was able to fix the date of the alleged first payment to Keogh as "about March 3rd" (44a), and even recalled telephoning Keogh on that day and his precise telephone message (41a-42a), which remarkably coincides with the entry for March 3 in the message book (see 653a-54a). Other startling instances of rejuvenation of memory by Erdman are demonstrable as to other significant dates. Nevertheless the Trial Court refused to inquire into the extent to which the message books had been used to help Erdman prepare his testimony.

Once the Trial Court found that the examination of the message books was unauthorized, it followed that any examination was an unlawful search and seizure, whose fruits should be suppressed.

The Court of Appeals' distinction between "examination" before trial and "production" at the trial is unsound, because the practical result is the same in either case. The Government either secures the actual document by compelling its production or a copy of the document as a result of its examination. There is no basic difference between the use of records as evidence at the trial and their use to help the Government prepare evidence in advance of trial. In either case, the consent necessary for a waiver is the same (See *Gouled* v. *U. S.*, 255 U. S. 298, 306 [1921]). If petitioner did not consent to produce the document, he similarly could not have consented to its unrestrained examination and copying.

The finding of consent here also represents a departure from the rule of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), that every presumption must be indulged against the waiver of a Constitutional right. The burden of proving waiver or consent is upon the Government; and the consent sought to be proved must be "unequivocal and specific," else there can be no waiver (See, *e.g. Karwicki* v. *U. S.*, 55 F. 2d 225, 226 [4th Cir. 1932]; *Chanel* v. *U. S.*, 285 F. 2d 217, 220 [9th Cir. 1960]).

We respectfully submit that in view of these principles and their traditional application, it was error for the Courts below to find consent upon the evidence here adduced. The cases upon which the Court of Appeals relied are inapt (S 18a). In all of them express consent had been given by the defendant to search his premises. We believe that such cases as *Gouled* v. *U. S.*, *supra*, *U. S.* v. *McCann*, (40 F. 2d 295, 296 [S.D.N.Y. 1930]), *Karwicki* v. *U. S.*, *supra*, and *U. S.* v. *Ruffner*, *supra*, more nearly accord with the facts adduced in this case.

In contrast to the cases upon which the Court of Appeals relied, petitioner never expressly gave his consent to an

examination of his message books by the F.B.I. At best the evidence is susceptible of a "choice of inferences" and in such event a waiver of Constitutional right cannot be found (*Channel* v. *U. S.*, *supra*, 285 F. 2d at 220).

In the face of the Government's concession that "there wasn't any explicit granting of these phone books as a matter of law" (565a), and the Trial Court's initial ruling that the testimony did not demonstrate "a waiver of a fundamental Constitutional right" (563a), there should have been a hearing on the extent to which the Government had made use of documents examined without such a waiver. The examination of the message books by the F.B.I. on the eleventh floor when they could have easily gone back to Keogh to get his permission was hardly within the concept of fair dealing. Their actions, we submit, came right within the language and purview of the decision of this Court in *Gouled* v. *U. S.*, *supra*, 255 U. S. 298.

V

The conceded facts did not show any corrupt act or intent sufficient to constitute a violation of Federal law.

(A)

Keogh did not offer any money to Judge Rayfiel. He was not a Federal officer, and had no jurisdiction of the Moore case. We vehemently deny, on his behalf that he ever received the money from Erdman; and believe that there was, at the very least, such real basis for the existence of reasonable doubt on this score. Assuming arguendo, however, that petitioner did receive the money, in our view he still was not guilty of conspiracy to commit the crime of endeavoring to obstruct justice, as proscribed by Title 18 U.S.C. § 1503.

The theory of the Government upon which the case against petitioner was submitted to the jury, was that his alleged crime consisted of two elements: (1) that he received a cash consideration; and (2) that he failed to disclose this fact to Judge Rayfiel (see Charge at 817a). This, in the view of the Government and the Courts below, rendered his contact with Judge Rayfiel a corrupt endeavor to obstruct justice.

We respectfully disagree. Had Keogh offered money to Judge Rayfiel or been a Federal officer, there could be no question that there was a corrupt endeavor to obstruct justice. Keogh allegedly took a cash consideration for speaking to Judge Rayfiel. Concededly, however, as the Court charged, it was not "illegal", "improper" or "wrong" to speak to a Federal judge about a sentence (816a-17a); Keogh, moreover, repeatedly offered to prove at trial that it was a common practice to provide pre-sentence information to judges outside of the probation report (604a-06a, 644a-46a, 734a-35a). Taking a consideration and failing to disclose this fact to the sentencing judge is not enough to render this concededly legal act a crime. The untenability of this theory may be demonstrated by illustration.

Probably a majority of persons who intercede with a sentencing judge have been the recipients of past favors or courtesies—be they cash, services or whatever. Can it be said that a clergyman has corruptly endeavored to influence a sentencing judge when he intercedes on behalf of one who is a substantial contributor to the church, or who has pledged to contribute in the event he evades sentence, and this fact is not disclosed by the clergyman? Similar is the case of the bank officer who intercedes on behalf of an actual or potential depositor. In all of these cases there is a consideration. It need not necessarily be cash or present considerations but in principle, it is indis-

tinguishable from the position allegedly assumed by Keogh in this case.

There must be more than mere consideration flowing to the interceder. In order for the act to be deemed corrupt, there must be overt and fraudulent misrepresentation, importunate and repeated advances, or actual deception and overreaching. This, we submit, is the lesson of *U. S. v. Polakoff* (121 F. 2d 333 [2nd Cir. 1941]), upon which the Government and the Trial Court relied in submitting the case against petitioner to the jury. In that case, there was evidence of "repeated and importunate advances" and of "misrepresent[ations]" and "lies" to an Assistant United States Attorney (Id. at pp. 334-5). No such circumstances were presented here. When Judge Rayfiel testified that petitioner Keogh "didn't make any suggestions or request" (458a), there was no basis for a finding of obstruction of justice.

In our view Title 18 U.S.C. (1503 is vague and indefinite. We ask whether a consideration alone, without more, is sufficient to constitute a "corrupt" endeavor; and if so, what type or quality of consideration is necessary to come within the ambit of the statute? Moreover, how much need be disclosed lest the act be deemed corrupt? These are entirely new interpretations of (1503. They are open and unsettled questions which warrant review.

(B)

In the event certiorari is granted we should also like to present for consideration the related question of whether the Court below properly excluded certain vital evidence bearing on petitioner's criminal intent.

As a general rule, a defendant in a criminal case always should have the right to testify as to his own knowledge and intent (*Wallace v. U. S.*, 162 U. S. 466, 477-8 [1896];

Buchanan v. *U. S.*, 233 Fed. 257, 259 [8th Cir. 1916]; *Krogmann* v. *U. S.*, 225 F. 2d 220, 229 [6th Cir. 1955]; 2 Wigmore, Evidence [3rd ed. 1940] § 581).

Petitioner Keogh attempted to show, to rebut the imputation of corrupt importuning, that it was the accepted practice in the Eastern District Federal Court for the judges to welcome pre-sentence information from sources outside the probation and pre-sentence reports.

The Trial Judge repeatedly rejected such testimony. He received testimony from Judge Rayfiel about his own practice (456a-59a), but excluded Keogh's offer of testimony about his knowledge of the general practice of the judges in the District Court (644a-46a). If the jury had been allowed to hear that it had been the practice of a number of Federal judges in the area (or at least Keogh's belief it was their practice) to listen in similar circumstances, the jury could have better understood Keogh's claim that he mentioned Moore to the sentencing Judge at the behest of a friend and without any thought of its being irregular. It would have marked the difference between a normal act done for a friend, and an irregular act which would presumptively have been done only for a corrupt motive.

The Court also rejected testimony of New York Supreme Court Justice Walter Hart concerning his practice in receiving such information while a Justice of the New York Court of Special Sessions, and his actual experience in giving such information to Federal judges while he was a practicing attorney, and while he was a Supreme Court Justice (604a-06a). A third offer of proof, concerning the practice of two Federal judges sitting in the Southern District of New York (734a-35a), was also rejected.

The exclusion of evidence bearing on intent is particularly serious here. The Court below approved the use of evidence of gifts and loans—concededly, unrelated to this

case (805a)—as showing "an attitude of mind in which Keogh might suggest a financial reward for an intercession with Judge Rayfiel" (S. 21a). To exclude rebuttal evidence tending to show that Keogh had an innocent intent in talking with Judge Rayfiel, deprived him of a fair trial.

Consonant with the foregoing there was additional evidence in this case which petitioner Keogh sought to adduce which pointedly rebutted the inferences engendered by the gifts and loan testimony. This evidence was also erroneously rejected by the Court. Keogh offered to prove at the conclusion of the trial that during the time he sat as a Justice of the Supreme Court of the State of New York he had occasion to render condemnation awards in amounts exceeding $114,000,000; and over $24,500,000 in the crucial year of 1961 alone (Record, p. 3203). Under New York law he fixed values in all these cases without the aid of a jury. That petitioner had occasion in the course of performing his judicial functions to pass upon matters involving such monumental sums of money was a matter that might have weighed heavily in the jury's mind in determining whether or not he took $22,500 from Erdman for seeing Judge Rayfiel.

In the light of the other serious questions presented by the Record, and the exclusion of pertinent evidence, this Court should review the case to determine whether a discussion with a Federal officer without any attempt to corrupt him, constitutes an obstruction of justice.

CONCLUSION

A public officer is peculiarly vulnerable to attack. He needs all the safeguards of judicial procedure to protect him from the inclination of press and public to "cut down the front runner". Where the trial of a judge involves crucial disputes of fact, it is therefore especially important in the public interest that this Court scrutinize closely the fairness of the trial. Compare *Glasser v. United States*, 315 U. S. 60, 67 (1942).

Each of the five major reasons for certiorari which we have described presents a question of general importance, raised on this record, and affecting the administration of justice in criminal trials.

The writ of certiorari should be granted.

Respectfully submitted,

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